

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICTORIO M. STEPHENS,  
Plaintiff,  
v  
CAPTAIN S. PADGET, A.D.A.  
Coordinator,  
Defendant.

No. C-05-4972 TEH (PR)  
ORDER OF DISMISSAL DUE TO DEATH  
OF DEFENDANT

(Doc. # 22)

I

On December 1, 2005, Plaintiff, a prisoner incarcerated at that time in the Santa Clara County Jail in San Jose, California, filed a pro se civil rights complaint for damages under 42 U.S.C. § 1983 and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("A.D.A."), claiming violations of his civil rights based on inadequate medical care. The court previously dismissed Plaintiff's Complaint with leave to amend on two occasions.

On August 8, 2007, the court issued an Order of Service of the Second Amended Complaint on Defendant Captain S. Padget, A.D.A.

1 Coordinator at the Santa Clara County Jail, and dismissed all other  
2 Defendants from this action. On August 30, 2007, the summons for  
3 Defendant Padget was returned unexecuted due to his retirement.  
4 Thereafter, the court ordered Plaintiff to provide a service address  
5 within thirty (30) days or Defendant Padget would be dismissed  
6 without prejudice pursuant to Rule 4(m) of the Federal Rules of  
7 Civil Procedure.

8 On July 21, 2008, Plaintiff filed a motion informing the  
9 Court that he had determined that Defendant Padget, the sole  
10 remaining defendant in this action, was deceased, and requesting an  
11 extension of time to determine whether a personal representative or  
12 a "successor in interest" could be served in lieu of Defendant  
13 Padget. Since that time, Plaintiff has failed to file anything with  
14 the court indicating that he has located a successor to Defendant  
15 Padget for purposes of service.

16 On January 23, 2009, the court granted Plaintiff thirty  
17 days to notify the court he had located a successor to Defendant  
18 Padget for purposes of service, and notified Plaintiff that failure  
19 to do so would result in dismissal without prejudice of Defendant  
20 Padget pursuant to Federal Rule of Civil Procedure 4(m).

21 On February 26, 2009, Plaintiff filed a Motion to Amend  
22 Action Renaming Defendant. Doc. # 22. In his motion, Plaintiff  
23 acknowledges the death of Defendant S. Padget and seeks to dismiss  
24 his as a Defendant in the action. Doc. # 22 at 1. Plaintiff also  
25 seeks to "name the 'current' American with Disabilities Coordinator  
26 of the Santa Clara County Jail 'Main Jail North' located in San  
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1 Jose, California as the sole Defendant in [the] Amended Complaint."  
2 Id. at 2. Plaintiff then explains he is presently unable to  
3 determine the name of the current A.D.A. Coordinator, and seeks the  
4 court's permission "to use the 'successor in interest' professional  
5 title until[] Plaintiff can determine the true and correct personal  
6 name of the Santa Clara County Main Jail North A.D.A. Coordinator."  
7 Id.

## 8 II

9 Liability may be imposed on an individual defendant under  
10 42 U.S.C. § 1983 if the plaintiff can show that the defendant  
11 proximately caused the deprivation of a federally protected right.  
12 See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v.  
13 City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person  
14 deprives another of a constitutional right within the meaning of  
15 section 1983 if he does an affirmative act, participates in  
16 another's affirmative act or omits to perform an act which he is  
17 legally required to do, that causes the deprivation of which the  
18 plaintiff complains. See Leer, 844 F.2d at 633. Even at the  
19 pleading stage, "[a] plaintiff must allege facts, not simply  
20 conclusions, that show that an individual was personally involved in  
21 the deprivation of his civil rights." Barren v. Harrington, 152  
22 F.3d 1193, 1194 (9th Cir. 1998).

23 Here, Plaintiff seeks to substitute for former Santa Clara  
24 County Jail Main Jail North A.D.A. Coordinator S. Padget the person  
25 who presently holds that position. But Plaintiff cannot show that  
26 the current A.D.A. Coordinator proximately caused the deprivation of  
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1 a federally protected right Plaintiff allegedly suffered well over  
2 three years ago. The court therefore DENIES Plaintiff's Motion to  
3 Amend Action Renaming Defendant (Doc. # 22).

4 III

5 When a party dies and the claim is not extinguished by  
6 applicable substantive law, the court may order substitution of the  
7 deceased party with the proper legal representative. Fed. R. Civ.  
8 P. 25(a)(1); Hilao v. Estate of Marcos, 103 F.3d 762, 766 (9th Cir.  
9 1996). Any party to the action or the deceased party's successors  
10 must file a "statement noting death" and must serve it in the same  
11 manner as a motion to substitute parties. Fed. R. Civ. P. 25(a)(3);  
12 see Barlow v. Ground, 39 F.3d 231, 233 (9th Cir. 1994). The filing  
13 of the "statement noting death" commences the running of a 90 day  
14 limitations period for substitution of the deceased party. Fed. R.  
15 Civ. P. 25(a)(1); see Barlow, 39 F.3d at 233-34. If the motion for  
16 substitution is not made within the 90 day limitation period, the  
17 action by or against the decedent "must be dismissed." Fed. R. Civ.  
18 P. 25(a)(1).

19 Here, Plaintiff notified the court of Defendant Padget's  
20 death on July 21, 2008. Under Federal Rule of Civil Procedure  
21 25(a)(1), Plaintiff had 90 days from that date to move to substitute  
22 Defendant Padget's successor in interest. To date, Plaintiff has  
23 neither identified a successor or representative of the deceased  
24 Defendant nor moved to substitute parties. Under these  
25 circumstances, the court will not keep this matter open.

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IV

For the foregoing reasons, the court hereby DISMISSES Defendant S. Padget as a Defendant in this action, DENIES Plaintiff's Motion to Amend Action Renaming Defendant (Doc. # 22), and DISMISSES Plaintiff's Second Amended Complaint (Doc. # 1).

The clerk is directed to terminate any pending motions as moot and to close the file.

IT IS SO ORDERED.

DATED 03/06/09



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THELTON E. HENDERSON  
United States District Judge